No. 8893

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

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CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS,

Appellants

v.

UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.,

Appellees

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# BRIEF OF APPELLEE UNITED STATES AND MOTION TO DISMISS APPEAL

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## INTRODUCTORY STATEMENT

It is the position of the United States (1) that the order appealed from is not an appealable order, and hence that the appeal should be dismissed, and (2) that the appeal is without merit.

Because appellee's motion to dismiss the appeal is sustained by substantially the same points and authorities as those contained in the argument on the merits, the motion for dismissal of the appeal is included under the same cover as the brief for appellee, in order that unnecessary repetition may be avoided.

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## MOTION TO DISMISS APPEAL

Comes now the United States of America, one of the appellees herein, by its counsel, and respectfully moves the Court to dismiss with costs the appeal taken herein by Charles E. Schmidt, Joseph Landell, Executor of E. A. Landell, deceased, Clarence Loebenthal, Trustee of Bernard Loebenthal, and Walter L. Haehnlen, upon the ground and for the reason that the order of the District Court denying appellants' motion for leave to intervene, from which an appeal has been allowed, is not an appealable order.

WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.
Attorneys for United States of America,
Appellee.

## *POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE APPEAL*

*The order from which an appeal has been allowed is not an appealable order.*

As pointed out in *United States* v. *California Canneries,* 279 U. S. 553, 556, an order denying leave to intervene is not appealable, except in a few exceptional cases. The reason for the rule is, that ordinarily the granting or denial of leave to intervene is within the discretion of the trial court and hence the court's order is not final.

It is therefore obvious that the argument which will be made by the appellee upon the merits of the appeal in support of its contention that there was no error in denying leave to intervene, will also support appellee's argument that the order from which an appeal was allowed is not a final or appealable order. The points and authorities contained in appellee's summary of argument, contained in the brief proper, p. 22, *infra,* are the points and authorities relied upon in support of appellee's contention that the order here involved comes within the general rule stated in the *California Canneries Case* and not within any of the exceptions thereto. Reference is therefore made to such points and authorities.

## STATEMENT OF THE CASE

The so-called "Statement of the Case" contained in appellants' brief, filled as it is with extracts from correspondence, scraps of evidentiary material without support in the record, legal arguments, unsupported assertions of counsel and miscellaneous anecdotes, is almost impossible to understand. No attempt will be made to point out its numerous errors. Whether the nomination of William Jennings Bryan in 1896 was one cause of the 1896 reorganization of the Northern Pacific (Br. 34); whether Mr. Johnson and Judge McCullen were "too good attorneys to permit their rights to be lost by laches" (Br. 40); what Mr. Stetson said in a letter in 1908, or in a brief in the Northern Securities Case (Br. 31); whether Mr. Earl in 1903 said that these stockholders should have been settled with long ago (Br. 35); or whether there were many negotiations for settlement of the Hoover suit (Br. 39) are matters with which this court is not concerned. Such a statement would appear to be of little assistance to the court, and for that reason appellee must state the case.

This is an appeal from that portion of an order of the District Court dated March 9, 1938 denying appellants leave to intervene and to file an intervening petition (R. 1187-1188, 1190).[1]

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[1]The order allowing the appeal was made by Judge Wilbur July 5, 1938 (R. 1271). This order was made upon a typewritten petition presented to Judge Wilbur. Copy of this petition is not printed in the record. Printed in the record on page 1246 is an earlier petition dated May 24, 1938 which was presented to Judge Webster and by him denied. It will be noted that the petition printed in the record did not list as an order sought to be appealed from that part of the order of March 9, 1938 denying leave to intervene. As pointed out at the time

The suit in which intervention was sought and denied was filed by the Attorney General July 31, 1930, against the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Northwestern Improvement Company, one of its subsidiaries, and the trustees under outstanding mortgages. The suit was brought pursuant to the Act of June 25, 1929, 46 Stat. 41, the full text of which is quoted in the Appendix, *infra*.

*The Act of June 25, 1929.*

The history of the Act referred to is as follows: The Act of July 2, 1864, 13 Stat. 365, and the joint resolution of May 31, 1870, 16 Stat. 378, made certain grants of public land to the Northern Pacific Railroad Company in aid of the construction of a railroad from Lake Superior to Puget Sound. After the railroad had been constructed, withdrawals of lands within the indemnity limits of the grant, principally for national forests, gave rise to a controversy between the United States and the

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the order allowing the appeal was sought from Judge Wilbur, the first time the denial of leave to intervene was specified as an order from which appeal was sought, was in the typewritten petition which was presented to Judge Wilbur and omitted from the printed record. This petition sought allowance of appeals from other portions of the order of March 9, 1938, and from numerous other orders made over a long period of time, ranging from May 24, 1932 to March 22, 1938, all of which attempted appeals were disallowed. Most of the assignments of error sought to be argued in appellants' brief relate to the orders from which appeal was denied. Only one of the assignments which accompanied the petition for appeal is printed in the record. That is the one relating to denial of intervention (R. 1248). The numerous assignments filed March 22, 1938, (R. 1217-1235), were not filed in connection with this appeal, but accompanied a petition for an appeal to the Supreme Court, which was denied. See *Northern Pacific R. R. by Charles E. Schmidt v. United States,* 58 Sup. Ct. 1036, (May 16, 1938).

railway company, successor to the railroad company, concerning the right of the United States to make such withdrawals, and in a case begun about 1915, known as the *Forest Reserve Case,* the United States sought to cancel the patent to certain lands so withdrawn for a national forest.

The decision of the Supreme Court in that case *(United States* v. *Northern Pac. Ry.,* 256 U. S. 51) after stating (pp. 58-60) the terms and history of the grants, held that

> * * * it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits. * * * if it could take part of the lands required for that purpose, it could take all and thereby wholly defeat the provision for indemnity. (pp. 66-67).

The case was therefore remanded to afford the parties an opportunity to show whether there remained, after the withdrawals, sufficient public lands to satisfy all of the losses in the primary limits.

The Department of the Interior thereupon began to adjust the grant upon the basis of the court's decision. A tentative adjustment prepared by the Commissioner of the General Land Office was transmitted to the Forester, Department of Agriculture, as well as to the railway company.

The Forester, commenting upon the tentative adjustment, specified 22 items or particulars in which he claimed there had been errors in the administration of the grant, breaches of its terms or conditions or fraud in its performance, and suggested an investigation by Congress. (Joint Committee on Northern Pacific Land

Grants, Hearings, vol. I pp. 9, 26, 27). President Coolidge then called the matter to the attention of Congress, and upon his recommendation a joint resolution was enacted (43 Stat. 461) suspending the adjustment and forbidding the issuance of further patents until a Congressional investigation could be had.

*Hearings Before Joint Congressional Committee.*

A joint committee was appointed pursuant to the resolution, and it proceeded to hold extensive hearings, which are recorded in a report containing some 5500 printed pages. The hearings followed in general the 22 suggestions made by the Forester. The attorney for the Forest Service presented the case for the Government, and upon the conclusion of the hearings the Attorney General was required by a further joint resolution (44 Stat. 1405) to advise the committee as to what legal or legislative action should in his judgment be taken. He made an analysis of the record of the hearings and made specific recommendations as to each of the twenty-two suggestions of the Forester. As a result of the hearings, the committee reported a bill which became the Act of June 25, 1929.

In the *Forest Reserve Case,* 256 U. S. 51, the Supreme Court said (at p. 58) that "the rights and obligations of the original railroad company * * * have long since passed to the present railway company and there is no need here for distinguishing one company from the other." Among the Forester's 22 items or suggestions, numbers 18 and 19 charged that the conduct of the railroad company and of the railway company in respect to proceedings taken to foreclose certain mortgages were

in violation of provisions of the joint resolution of May 31, 1870 relating to the disposition and sale of lands within the grant. The committee reported (Cong. Rec., 70th Cong., 2nd Sess., pp. 5121-5122; H. Rep. No. 9190, 71st Cong., 1st Sess., No. 2) that such proceedings constituted a breach of the covenants of the grant rendering it subject to forfeiture. But neither in the course of the hearings nor in the committee report was there any suggestion by the Forester, by the Attorney General or by the committee that any occasion existed for questioning the statement of the Supreme Court that the railway company did in fact succeed to the rights and obligations of the railroad. The inquiry as to the mortgages and the foreclosure proceedings related solely to whether they constituted a breach of covenant by the grantee.

The Act of June 25, 1929, 46 Stat. 41, which resulted from these hearings, provided as follows:

1. * * * all lands within the indemnity limits . . . which, on June 5, 1924, were embraced within . . . any national forest . . . and which, in the event of a deficiency . . . would be, or were, available to the Northern Pacific Railroad Company *or its successor, the Northern Pacific Railway Company,* by indemnity selection . . . are hereby retained by the United States. . . Provided, That for . . . the aforesaid indemnity lands hereby retained . . . the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, . . . shall receive compensation from the United States to the extent if any, . . . the courts hold that compensation is due. (Sec. 1). [Italics supplied].
2. * * * all of the unsatisfied indemnity selection rights . . . are hereby declared forfeited to the United States. (Sec. 2).
3. The Attorney General is hereby authorized

> and directed forthwith to institute and prosecute such suit or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, * * * (Sec. 5).

4. Section 5 recited that in such judicial proceedings there should be (a) a full accounting between the United States and said companies, (b) a determination as to whether either of said companies was entitled to any of the unpatented lands within indemnity limits, (c) a determination as to what extent the terms, conditions, and covenants of the grants have been performed, "including the legal effect of the foreclosure of any and all mortgages . . . and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands," (d) a determination as to what lands have been erroneously patented as the result of fraud, mistake or misapprehension as to the proper construction of said grants, and (e) a determination of "all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies."

The Act repeatedly alludes to the railway company as the successor of the railroad company. It contains no provision for a determination of the truth of this recital.

In brief, the Act of 1929, 46 Stat. 41, simply provided (a) that if the grantee is entitled to any further lands,

the United States would pay for them rather than convey the lands to the grantee, and (b) that it should be determined by court action whether the grantee was entitled to further lands, and, if so, the compensation to be paid therefor.

*Suit Filed in 1930. First Phase.*

This suit was filed in the United States District Court for the Eastern District of Washington and took the form of a bill to quiet title in the United States to approximately 2,900,000 acres of withdrawn land in the claimed indemnity limits. The bill of complaint (R. 1-147) contained (a) numerous charges of violation of the provisions of the granting acts, (b) allegations of fraud in the performance of the acts, and (c) allegations of errors in their administration.[2]

Among the charges of breach of such provisions were allegations that the acquisition of the rights of the Northern Pacific Railroad Company under the grant by the

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[2]Paragraphs I to V (R. 1-13) contain preliminary and general allegations. Paragraphs VI to XIX and paragraph XXXI (R. 13-65, 125-128) contain allegations of sundry violations of the grant. Paragraphs XX to XXVII and XXXII to XXXVII (R. 65-106, 128-138) contain allegations as to numerous mistakes and errors in the administration of the grant. Paragraph XXVIII (R. 106-117) contains allegations of fraud on the part of the defendant railway company in connection with the mineral classification of lands under the Act of February 26, 1895, 28 Stat. 683. Paragraph XXIX (R. 117-124) contains allegations with respect to the so-called "Indian Point," including the allegation that large quantities of lands were erroneously patented to the railroad company to which the company was not entitled because the lands had been reserved for various Indian tribes. Paragraph XXXVIII (R. 138) alleges the statutory forfeiture under the Act of June 25, 1929. The remainder of the paragraphs (R. 139-142) contain allegations relating generally to claims for discovery and accounting.

Northern Pacific Railway Company through foreclosure of certain mortgages, pursuant to a plan of reorganization of the Northern Pacific Railroad Company of March 16, 1896, was "in evasion of and in defiance of the provisions of the said joint resolution of May 31, 1870" (R. 63; paragraphs XVI to XIX, R. 47 to 65).

Briefly the burden of this portion of the bill is the same charge as that made by the Forester before the joint committee. It is, not that the railway company did not succeed to the railroad company's interest in the land grant, but rather, that it did acquire the lands in defeat of the public policy,[3] and this is the thing complained of. With reference to the 1896 plan or reorganization, it is alleged that it was collusive and fraudulent against the United States in that it was the intent and purpose to acquire for the successor company thirty-five million acres of the lands contained in the land grant "in evasion of and in defiance of the provisions of the joint resolution of May 31, 1870," which required that the lands on foreclosure "would be sold under bona fide sales to third persons at public sale, at places within the States and Territories in which they shall be situate" (R. 62-63).

Thus the bill alleges that the railway company received and acquired lands which it mortgaged and other-

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[3]" * * * as a consequence of which said foreclosures and other proceedings collateral thereto, the Northern Pacific Railway Company, a Wisconsin corporation, one of the defendants named in this action, succeeded to by operation of law or otherwise, whatever rights, titles, interests and obligations either in law or in equity that were then held under and by virtue of the said Act of July 2, 1864 . . . by the said Northern Pacific Railroad Company" (R. 35-36).

wise dealt with, but which Congress intended should be sold to third persons, with the result that the railway company received

> Values in excess of the prices the lands would have brought had they been sold to third persons under bona fide sales upon the foreclosure of the said mortgages, all of which was in violation of the provisions of the said Act . . . and Joint Resolution (R. 64).

The prayer of the complaint was (1) that the court quiet title in the United States to all of the withdrawn lands involved in the suit and decree that the defendants are entitled to no compensation (R. 142-144); (2) that the court decree that the unsatisfied indemnity selection rights if any exist are now forfeited by the Act of June 25, 1929 (R. 144); (3) "that the court determine the extent to which the Northern Pacific Railway Company and/or its predecessors in interest have failed to comply with the covenants in the Joint Resolution . . . and pertaining to (a) the disposition of the granted lands by settlement and preemption five years after the completion of the entire railroad and (b) pertaining to the public sale of the granted land upon the foreclosure of any mortgage . . .; that this court decree that any and all moneys received . . . from or by reason of the said granted lands, after breaches of either one or both of the said covenants, be declared to have been received in trust . . . and that the plaintiff be awarded judgment against the Northern Pacific Railway Company for such portions of said moneys, or their equivalent as this court may find the plaintiff entitled to receive" (R. 144-145); (4) for an adjustment and accounting of the grant (R. 146); (5)

for an injunction, discovery, and general relief (R. 147).

A voluntary appearance was entered by all defendants (R. 225). The railway company filed an answer which contained a general motion to dismiss and which pleaded the defenses of equitable estoppel, res adjudicata, laches, statute of limitations, and other defenses (R. 244-416). The railroad company first filed a disclaimer (R. 417) of any interest in the subject-matter of the suit, which was later stricken on motion of the Government (R. 418), and the railroad company filed an answer in which, *inter alia,* it adopted by reference the answer of the railway company (R. 420-421).

On February 25, 1932, the trial court appointed Frank H. Graves as Special Master, and under Equity Rule 29 the special defenses raised by the pleadings were called up for hearing prior to trial on the merits. Upon motion of the railroad company the defenses raised in its answer were also referred to the Master on May 24, 1932 (R. 423). After a hearing on the issues thus raised extending over a period of more than a month, the Master on May 31, 1933 filed his report which was generally favorable to the defendants (R. 425-662). With respect to the allegations of the bill relating to the 1896 foreclosure, the Master held that the facts alleged disclosed no breach or violation of the terms of the joint resolution and that the demurrer to this subdivision of the bill should be sustained (R. 643-646). He further pointed out that it was not sought by the Government to set aside the sales (R. 645) and that in any event the Government would be estopped to do so by reason of its many years of dealing with the railway company as successor to the railroad company (R. 648). Exceptions which had been filed and

argued by the parties on both sides, were overruled, and by its order of October 3, 1935, the court adopted the report of the Master "in its entirety" (R. 680).

*Second Phase.*

Thereafter, on April 21, 1936, the case was referred back to the Master (R. 684), with directions to determine the lands, if any, for which the plaintiff or defendants are entitled to receive compensation, leaving for later determination the amount of such compensation.

After a hearing which lasted for more than ten months, and on July 26, 1937, the Master filed his second report (R. 686), finding that the railway was entitled to compensation for approximately 2,500,000 acres. Again exceptions were filed to the report by the parties on both sides within twenty days after it was made, as required by Equity Rule 66 (R. 887, 893). On March 22, 1938, Judge Webster, after hearing argument upon the exceptions, made an order (R. 1211) sustaining some exceptions, overruling others, and reserving ruling on others pending further consideration, and directing the submission by the parties of proposed findings. By such ruling, the area of withdrawn land for which compensation should be paid by the plaintiff was reduced to approximately 1,400,000 acres.

*Some Issues Remain Undetermined.*

*Third Phase.*

It will be noted that the report of the Master just referred to did not pass upon the amount of compensation, which remains undetermined. It was believed that it would be to the advantage of all parties to have a decision of the Supreme Court finally determine the lands

for which compensation must be paid, before the introduction of evidence should begin upon the third phase of the case, which might be called the valuation phase, since the appraisal of such a vast acreage is obviously an expensive undertaking. Accordingly, the Act of May 22, 1936, 49 Stat. 1369, authorizing a direct appeal to the Supreme Court from the orders entered in the first and second phases of the case, was passed, copy of which is set forth in the Appendix, *infra.*

*Appellants' Attempted Intervention.*

It was not until after the Master's second report had been filed and more than seven years after the filing of the Bill of Complaint that the appellants filed any pleadings in this cause. Even then, they made no application for leave to intervene until six months later. On August 25, 1937 and after the time for filing exceptions had expired, they filed a motion to extend for thirty days the time "within which the said Northern Pacific Railroad Company may file exceptions to the report of Commissioner Frank H. Graves."[4] Thereafter and also without first having obtained leave of court, the appellants filed the following papers:

1. September 3, 1937, appellants filed an answer and cross-bill (R. 952) entitled "Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders," alleging that the railroad company was being held "in captivity" by the railway company, and asking the court to determine a variety of issues with respect to the legality of the corporate organiza-

[4]Of course the Northern Pacific Railroad Company through its own attorneys had regularly filed exceptions within the time allowed by the Equity Rules. (R. 887, 891).

tion of the railway company and the ownership not only of the lands in suit but of all property held by the railway company.

2. On February 19, 1938, appellants filed a motion "to construe, modify, and/or amend" the report of the Master (R. 1182), which in effect asked the court to determine which of the two companies was the owner of the property involved in and covered by the report.

3. On February 19, 1938, appellants filed purported exceptions to the Master's report (R. 1185), in which they "make and adopt each and all of the exceptions to said report heretofore filed in this cause on behalf of the Northern Pacific Railway Company and the Northern Pacific Railroad Company."

The motion and petition for leave to intervene were filed by appellants January 31, 1938. The allegations of the petition (R. 1037) are similar to those made in the answer and cross-bill, to which it refers. It alleges (R. 1040-1041):

> One of the principal bases of this petition is to restore to the said railroad company all its rights, privileges, franchises, properties, money and assets, free and clear of all encumbrances, interference or management of and by the said Northern Pacific Railway Company, hereinafter called the railway company, and to release the said railroad company from the captivities which it has been put into and held under by the wrongful and unlawful acts of the said railway company and the officers and officials of the said railway company and the said railroad company as hereinafter set out and to declare, decree and enforce all the rights of the said railroad company and of these minority stockholders and all others in a similar position and of all of the said defendants and of all other persons interested * * *.

It is alleged in the petition[5] that ever since the reorganization of 1896 these appellants, non-consenting stockholders of the railroad company, have endeavored to obtain relief from that company (R. 1043), but without success because the railway company, through control of the railroad company's stock, keeps the latter "in captivity" (R. 1020).

The burden of the petition is that no title or other right ever passed to the railway company, and that such company is not the successor of the railroad company. The allegations in the petition and in the answer and cross-bill to which reference is made, are to the effect that:

1. The Northern Pacific Railway Company was never legally organized because a majority of the incorporators did not attend a certain meeting (R. 998).
2. That the railway company was prohibited by

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[5]To extract any meaning from the petition is well-nigh impossible. It is so multifarious, prolix and unintelligible as to defy understanding. The matters here stated have been laboriously winnowed from a mass of disjointed quotations from letters, newspaper stories, court opinions, legal arguments and miscellaneous anecdotes, such as private correspondence between attorneys in the Hoover suit (R. 1052-1057), what Josiah Perham once said (R. 1057), what was averred in other suits (R. 1058, 1106, 1107), what F. L. Stetson said while speaking, while testifying, and in letters (R. 1066, 1101, 1104), the entire contents of a resolution introduced in Congress but never voted on (R. 1085), legal arguments (R. 1097, 1116, 1153), court opinions (R. 1099, 1117, 1119, 1121, 1130, 1149, 1164, 1172), what Hiram Hayes said in affidavits, testimony, and letters (R. 1109, 1111, 1113, 1139), what the "Superior Times" of Saturday, September 4, 1880, had to say (R. 1133), and what is said in a book on Corporate Financing (R. 1171). The petition must be read in full to be appreciated.

Wisconsin law from buying the railroad,[6] and that certain later validating statutes of Wisconsin were contrary to the Wisconsin constitution (R. 1129-1131, 997-1007).

3. That the railway company had been consolidated with the railroad company and ceased to exist as an independent entity in that the railroad company since before 1880 owned 3800 shares of the stock of the railway company (R. 1108, 1109, 1111, 1113, 1132, 1142) and also built a road for the railway company (R. 1138-1141, 1143), "and adopted such road as part of its own main line and from that time the [railway company] ceased to keep up any separate corporate existence" (R. 1133).[7]
4. That certain mortgages executed by the railroad company between 1879 and 1889, and later foreclosed, were unauthorized and ineffective (R. 993-994, 980).
5. That the decree of foreclosure of these mortgages, made pursuant to the 1896 plan for reorganization of the Northern Pacific (R. 1058-1084), was null and void since the court was

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[6]Evidently because of lack of statutory authority to own lands (R. 1124) and because of a statutory prohibition of purchase where a parallel line existed (R. 1129).

[7]The consolidation is alleged in the following language, which is typical of the entire petition: "The decision in Williams vs. Southern New Jersey R. R. Co., 26 N. J. Equity, 398, is ample authority that the conduct of the parties here was sufficient to work a consolidation even though no formal agreement of consolidation was recorded with the State authorities" (R. 1135).

without jurisdiction, (R. 1147) and the proceedings were by consent and collusive (R. 1153).

6. That the sales under this and other supplementary decrees were in violation of the joint resolution of May 31, 1870, in that the lands were not sold upon the notice or at the places required by law (R. 1151, 1161).
7. That the deed made by the railroad company to the railway company pursuant to the provisions of the decrees of the court and resolution of the board of directors was invalid in that the property sought to be conveyed was not transferable (R. 1011-1013).

The prayer is that they be permitted to file the petition, that the court find that the 1896 reorganization and foreclosure, were null and void (R. 1172-1173) and that no title ever passed out of the railroad company, but that title to all granted lands is still in such company (R. 1025-1026),[8] that the railroad company "be released from the captivity thereof by the said railway company," and in the alternative, that appellants have a money judgment against the railway company for the

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[8]The cross-bill alleges (R. 1019):

> That these minority stockholders and others similarly situated are entitled to their pro rata interest in all the properties, lands, land grants, leases, notes, bonds, stock, monies and all other assets of the Northern Pacific Railroad Company owned and possessed by the Northern Pacific Railroad Company in 1875 and in 1896 and all of same which have been seized, grabbed, collected, taken possession of and held by the said so-called railway company from 1896 to this date, whether or not held by the said so-called railway company in its own name or whether put into the names of other corporations and individuals for its benefit * * * .

par value of their stock plus dividends declared (R. 1173, 1174).

There is no allegation that the railway company and the railroad company are not adequately presenting all possible claims against the United States.

The motion for leave to intervene and to file the petition in intervention was denied by the court March 9, 1938 (R. 1187). This appeal from the order denying such leave was allowed July 5, 1938 (R. 1271).

After the petition for leave to intervene had been denied the appellants filed a series of motions[9] which are recited in many of the assignments of error here urged. As they relate to matters and things done subsequent to the ruling now appealed from, none of them have any bearing here.

It should, however, be noted that on March 22, 1938, and during the same term, the court, in denying a so-called "motion to re-hear" matters previously disposed of, recited in the order (R. 1209, 1210):

> It is further ordered, that this Order shall be with-

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[9]On March 11, 1938 appellants filed a petition and motion "to review, revise, and amend decree or order entered in this cause on March 9, 1938" (R. 1192), containing an interesting and sprightly account taken from the Spokane Spokesman-Review of March 9, 1938 describing how Judge Webster surprised his listeners. A like motion was made by "Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders" (R. 1190), and on March 16, 1938 the same parties filed a motion to dismiss the original and amended bill of complaint. (R. 1207). On August 29, 1938 and after this appeal had been allowed, appellants filed a motion to strike certain stipulations of the parties which had been approved by the Court August 1, 1938, (R. 1258), and on September 3, 1938 appellants filed a so-called "answer and cross-bill of the Northern Pacific Railroad Company by Schmidt and other minority stockholders to the amendment to the amended bill of plaintiff filed August 1, 1938.".

out prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

## SUMMARY OF ARGUMENT

*I. Appellants had no absolute right to intervene. At the very most their intervention was within the court's discretion. If so, the order denying intervention was not appealable because not final. The argument upon this point demonstrates both (1) that the appeal should be dismissed, and (2) that the appeal is without merit.*

A. The Act of June 25, 1929, under which this suit is brought does not confer upon appellants a right to intervene. On the contrary it clearly contemplates that no such issue as that tendered by appellants shall be tried.

(1) The Act repeatedly refers to the railway company as the "successor" of the railroad company. Act of June 25, 1929, 46 Stat. 41, secs. 1, 2, 4, and 6.

(2) While Section 5 of the Act authorizes findings relating to certain "proceedings and foreclosure," such findings are limited to their bearing upon the question of performance of the provisions of the granting acts. There is no provision in the Act of 1929 authorizing the court to determine whether the railway company is the successor of the railroad company.

(3) The history of the Act discloses that it was never contemplated that the issues now tendered by appellants should be tried,—rather that Congress accepted as final the statement of the Supreme Court in the *Forest Reserve Case,* 256 U. S. 51, 58, that the rights of the railroad company had passed to the railway company.

Hearings before Joint Committee, pp. 4333, 5093, 5247, 5311, 5504.

Cong. Rec., 70th Cong., 2d Sess., p. 5118.

*United States v. Northern Pac. Ry.*, 256 U. S. 51, 58.

B. There is as yet no fund in court. Indeed, after the Supreme Court has heard the appeal authorized by the Act of May 22, 1936, its decision may be that there never will be any fund. Until that appeal is disposed of, any attempted intervention to claim a fund would be premature.[10] Judge Webster's Order of March 22, 1938 (R. 1209, 1210), carefully reserved to appellants any rights they might have "when the fund, if any . . . is established and fixed."

Act of May 22, 1936, 49 Stat. 1369.

(1) Ordinarily denial of leave to intervene is not appealable but is within the discretion of the court.

*United States* v. *California Canneries*, 279 U. S. 553.

Exparte *Cutting*, 94 U. S. 14.

*Credits Commutation Co.* v. *United States*, 177 U. S. 311.

(2) And while an exception to the general rule may apply where there is a fund or property in court, this is applicable only when the would-be intervener has a *direct* and *immediate* interest in a *res*.

*United States* v. *California Canneries*, 279 U. S. 553.

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[10]As is pointed out in the argument p. 37, *infra*, appellant's claim is based upon grounds other than an alleged interest in a fund likely to be dissipated.

*Credits Commutation Co.* v. *United States,* 177 U. S. 311.

(3) And where, as here, the fund may never come into existence, it is within the court's discretion to deny intervention, for as yet there is no fund.

*Aiken* v. *Cornell,* 90 F. (2d) 567, (C. C. A. 5).

(4) And this is particularly true where the court, as here, denies intervention "without prejudice."

See *King* v. *Barr,* 262 Fed 56, (C. C. A. 9), *cert. denied,* 253 U. S. 484.

C. A careful examination of the proposed petition fails to disclose any sufficient claim by petitioners that the claim against the United States, for lands or compensation, is not being adequately presented.

*O'Connell* v. *Pacific Gas & Electric Co.,* 19 F. (2d) 460, (C. C. A. 9).

See *New York City* v. *New York Tel. Co.,* 261 U. S. 312, 316;

*Difani* v. *Riverside County Oil Co.,* 201 Cal. 210, 215; 256 Pac. 210, 212.

D. Under the rule stated in *Washington* v. *United States,* 87 F. (2d) 421, 434, (C. C. A. 9), that an order denying leave to intervene is not a "final order" if there is some other appropriate remedy available to intervener, it is clear that appellants have no right to intervene here, for there is nothing to prevent their bringing an independent stockholders' bill, such as was done in the Hoover suit. (R. 1044, 1052.)

(1) There is not a single authority to support an assertion that the United States would be a necessary or indispensable party to such a suit. The United States would have no interest in the *object* of such a suit. Its interest in the land grant is not

such as to make it either an indispensable or a necessary party.

Story, Equity Pleadings, (9th ed.), secs. 72, 230.

(2) Many suits relating to the ownership of lands within this grant, have proceeded without a suggestion that the United States was a necessary party.

*II. The court was fully justified in disallowing the intervention by reason of the fact that it would unduly complicate and vex the issues to be tried by bringing into the suit a controversy solely between interveners and the defendants—a field of litigation not in issue between or open to the original parties.*

*Chandler Co.* v. *Brandtjen Inc.,* 296 U. S. 53, 57-58.

*Aiken* v. *Cornell,* 90 F. (2d), 567, 568, (C. C. A. 5).

(a) The bill of complaint alleges that the railway company is the successor to the railroad company (R. 35). This was in accord with the mandate of the Act of June 25, 1929, as herein stated. That no issue on this point was tendered was repeatedly pointed out by the Master (R. 641).

(b) The issue tendered by the petition in intervention relates to property and rights wholly foreign to this suit. This suit relates solely to the land grant. Appellants' claim covers as well all assets of the railway company (R. 1040-1041, 1172, 1026).

*III. The application to intervene was not timely, and was for that reason properly denied.*

*Merriam* v. *Bryan,* 36 F. (2d) 578, (C. C. A. 9).

*King* v. *Barr,* 262 Fed. 56, (C. C. A. 9).

(a) By their own showing petitioners have known

of their present claims since 1896 (R. 1043). They have known of the Hoover suit since 1900 (R. 1044) and they have known of this suit since its institution on July 31, 1930. The bill as filed disclosed that no issue was made as to whether the railway company was the successor of the railroad company (R. 35).

(b) The motion for leave to intervene came exactly seven years and six months later, on January 31, 1938 (R. 1036). Such delay is inexcusable.

*IV. Orders made prior to the attempted intervention, as well as proceedings had subsequent to the order from which appeal is taken, are not affected by nor relevant to this appeal.*

## ARGUMENT

### I.

It is here contended that appellants had no absolute right to intervene. At the very most their intervention was within the court's discretion. If so, the order denying intervention was not appealable because not final. The argument upon this point demonstrates both (1) that the appeal should be dismissed, and (2) that the appeal is without merit.

*A. The Act of June 25, 1929, under which this suit is brought does not confer upon appellants a right to intervene. On the contrary it clearly contemplates that no such issue as that tendered by appellants shall be tried.*

Since appellants assert that Section 5 of the Act of June 25, 1929, 46 Stat. 41, confers on them an unconditional right to intervene here, that assertion should first be examined. The portion of Section 5 which contains the language relied on by appellants reads as follows:

In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine *to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed* by the United States, and by the Northern Pacific Railroad Company, or its successors, *including the legal effect of the foreclosure of any and all mortgages* which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and *the extent to which said proceedings and foreclosures meet the requirements of said resolution* with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court *all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies or their successors in interest* under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment. [Italics supplied].

It is apparent from the language of the single sentence

here quoted that "the legal effect of the foreclosure" is specified as one of the items to be considered by the court in determining "to what extent the terms, conditions and covenants . . . in said granting Acts have been performed." That is, the court is to find whether the "proceedings and foreclosures meet the requirements" of the resolution, or whether they constitute a breach thereof. The controlling words are: "to what extent the terms . . . have been performed."

Appellants assume that the section directs the court to determine whether, under the circumstances surrounding the foreclosure of the mortgages, the Northern Pacific Railway Company succeeded to the rights of the Northern Pacific Railroad Company. The section says no such thing. Consideration of these "proceedings and foreclosures" is limited to their bearing upon the question "to what extent the terms . . . have been performed."

The language near the end of the sentence permitting the railroad company, the railway company, "or any other proper person," to have certain matters determined, limits such right to claims and matters "which may be germane to a full and complete determination of the respective rights of the United States and said companies" under such granting Acts.

Obviously the Act did not contemplate that litigation to determine the respective rights of the United States and of the beneficiaries of the land grant should be cluttered up with a complaint in the nature of a stockholder's bill, designed to litigate the internal quarrels of the Northern Pacific companies. So far as the United

States was concerned, it had no interest in such a dispute.

The Supreme Court, in the very case giving rise to the whole inquiry, *United States* v. *Northern Pac. Ry.*, 256 U. S. 51, said (p. 58):

> The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other.

Congress had no more doubt about this proposition than had the Supreme Court, for the very Act here in question specifically recited that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Company. Thus in Section 1 reference is made to indemnity lands available "to the Northern Pacific Railroad Company *or its successor, the Northern Pacific Railway Company.*" [Italics supplied] This language is again repeated twice in the same section, once in Section 2, once in Section 4, and once in Section 6.

That there was no question in the mind of Congress that the railway company was in fact the successor of the railroad company (the only controversy being as to whether, in executing and foreclosing the mortgages referred to, the companies had breached the terms of the grant so as to open it to forfeiture by Congress) is made plain by the history of the Act of June 25, 1929. This history may be briefly summarized as follows:

1. On February 23, 1924, President Coolidge addressed a letter to the chairman of the House Committee on Public Lands in support of a proposed joint

resolution directing the Secretary of the Interior to withhold adjustment of the land grants until Congress should have made an inquiry. (Joint Committee Hearings, vol. 1. p. 5). The letter enclosed a communication of the Secretary of Agriculture stating that "the defaults of the Northern Pacific were numerous and flagrant." The letter also enclosed a brief (Hearings, p. 27) which discussed in detail the execution and foreclosure of certain mortgages as in violation of the joint resolution of May 31, 1870, and as ground for forfeiture, citing the case of *Oregon & Cal. R. R.* v. *United States,* 238 U. S. 393.

2. June 5, 1924, Congress passed the joint resolution suggested by the President 43 Stat. 461, and providing for a joint committee "to make a thorough and complete investigation of the land grants of the Northern Pacific Railroad Company, *and its successor, the Northern Pacific Railway Company.*" [Italics supplied].

3. The joint congressional committee began its hearings March 18, 1925 and concluded the taking of testimony on June 29, 1926. The testimony and incorporated documents cover some 5086 pages. Mr. D. F. McGowan, Attorney for the United States Forest Service, who had represented the United States throughout the hearings, on December 1, 1926, at the request of the committee, prepared a digest summary of the Government's case made at the hearings (Hearings p. 5087). In the summary preceding the digest it was stated:

> "all of the lands of the grant passed to the reorganized Northern Pacific Railway Co." (p. 5093).

In the digest of the evidence, under the heading relating to the claim that the foreclosure proceedings and the disposition of the mortgaged property was in violation of the terms of the joint resolution of May 31, 1870, (p. 5174) specific reference is made to the 1896 reorganization of the Northern Pacific (p. 5231) and it is stated: (p. 5247)

> "Under the 1896 reorganization proceedings the Northern Pacific Railway Company acquired the land grant and other properties of the Northern Pacific Railroad Company."

In this connection, attention was called to the recital by the Supreme Court in the *Forest Reserve Case,* 256 U. S. 51, to the effect that the rights and obligations arising out of the grant have passed to the presерent railway company, and it is stated: (p. 5248)

> It is obvious therefore that the present Northern Pacific Railway Co. carry all of the obligations of the Northern Pacific Railroad Co. arising out of the grant and that by succeeding to the rights of the Northern Pacific Railroad Co. the Northern Pacific Railway Co. is responsible for the obligations of the Northern Pacific Railroad Co.

In short, it was the Government's position at the hearings that the Supreme Court was correct in reciting that the railway company had succeeded to the rights of the railroad company.[11]

4. On December 29, 1926, also at the request of the

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[11]The record of the Joint Committee Hearings shows that Mr. McGowan, as investigator for the committee, was careful to take no part, and to lend no aid to either side, in this minority stockholders' controversy. "I did not want anybody to have any semblance of anything that would lead to the conclusion that my case was tied in any way with this old case of the stockholders." (See Joint Committee Hearings, p. 4649-4651).

committee, Mr. McGowan transmitted to the committee a form of a proposed bill outlining the powers of Congress with respect thereto, and reciting: (p. 5311)

> Congress should take action to terminate any unsatisfied indemnity selection rights or privileges *now held by the Northern Pacific Railway Co.*, and arising under the Northern Pacific land grants. [Italics supplied].

5. On March 3, 1927 by joint resolution (44 Stat. 1405) the joint committee was continued and the Attorney General was directed to advise it as to what legal or legislative action should in his judgment be taken in the matter before the committee.

6. On February 8, 1928 pursuant to the requirement of this joint resolution, the Attorney General transmitted a memorandum (Hearings, p. 5485) commenting in detail upon the suggestions which had been made by the Forester to the joint committee and with respect to which the hearings had been had. With reference to the suggestions 18 and 19 relating to the foreclosure proceedings and the disposition of the granted lands, the Attorney General's memorandum summarizing the history of the foreclosure and reorganization proceedings advised the committee that (Hearings, p. 5504):

> The result was that the railway company acquired the land grant and there was no compliance with the sales provisions contained in the resolution of May 31, 1870 . . . The conclusion reached is that the provisions of the resolution of May 31, 1870, applied to the lands covered by both grants and were enforceable covenants and that they were not performed by the company. Under the authority of *Oregon & California Railroad Co.* v. *United States*

(238 U. S. 393), *the breach of these covenants entitled the United States to revest in itself the granted lands remaining in the hands of the company.* [Italics supplied].

7. March 2, 1929 the joint committee made its report, Cong. Rec., 70th Cong., 2d Sess., p. 5118, reporting a bill in substantially the same form as the Act of June 25, 1929. In connection with the report Mr. Colton for the committee made particular reference to the memorandum of the Attorney General of February 8, 1928, and in the course of his remarks in the House stated (Cong. Rec., 70th Cong., 2d Sess., p. 5121-5122):

> In arriving at the conclusion that the forfeiture should be declared, your committee was influenced by, among other things: . . . (c) the collusive sales of the granted lands in violation of and in evasion of the provisions of the resolution of May 31, 1870, in connection with the foreclosure of the mortgages coincident with the 1875 and the 1896 reorganizations of the Northern Pacific Railroad Co. . . . These propositions were given weight, singly and collectively, by your committee in arriving at the conclusion that the forfeiture covered by section 2 of H. R. 17212 be declared.

8. At the next session of Congress and on April 29, 1929 the joint committee again reported the bill and made a similar report incorporating Mr. Colton's remarks in the report (H. Rep. No. 9190, 71st. Cong., 1st Sess., Rep. No. 2).

9. The enactment of the Act of June 25, 1929 followed, and on July 31, 1930 the Bill of Complaint was filed (R. 1-147). The 5536 pages of the Joint Committee Hearings are barren of any suggestion that the committee or Congress had any interest whatever in

a determination of the claims now asserted by these appellants. On the contrary, the whole record of the hearings discloses that when Congress in the Act of June 25, 1929, used the words, "or its successor, the Northern Pacific Railway Company," it did so advisedly, accepting as a fact the statement to this effect in the *Forest Reserve Case,* 256 U. S. 51. The reference in Section 5 to the "legal effect of the foreclosure of any and all mortgages" related solely to the required findings "to what extent the terms, conditions, and covenants" had been performed, as the same had a bearing upon the forfeiture declared in Section 2.

That it was the intention of Congress thus to treat the railway company as unquestionably the successor of the railroad company, and that Congress did not contemplate that any such issue should be tried in this suit is made manifest by comparing the outright recital in the Act of June 25, 1929, that the railway company was the successor, with the carefully worded proviso in the Act of July 1, 1898, 30 Stat. 620 as follows:

> *And provided further,* that nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provi-

> sions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted.

Obviously all question on this point was now deemed resolved. If, as asserted by the appellants, the Attorney General refused to put the matters now urged by the would-be interveners in issue, he too must have understood the Act of June 25, 1929, to mean what it says, and not what appellants say it says.

Just why the Government should be interested in the internal quarrels of the Northern Pacific companies is difficult to perceive. It would be most unreasonable to suppose that Congress would require this suit which was to settle "the respective rights of the United States and said companies or their successors under said Act of July 2, 1864, and said joint resolution of May 31, 1870," to be complicated by this purely collateral claim of a few minority stockholders. What is here said with reference to the Act of June 25, 1929, and its legislative history, discloses that Congress intended that no such extraneous issues should be here determined.

The proper conclusion is that reached in *United States* v. *Union Pacific R. R. Co.,* 98 U. S. 569, 608, as follows:

> We are bound, therefore, to presume that Congress did not intend that this special remedy should include any thing beyond the matters which we have seen were so carefully and so specifically mentioned as grounds of relief.

*B. The general rule is that denial of intervention is not an appealable order.*

At the outset appellants are confronted by the proposition that ordinarily an order denying leave to inter-

vene is not a final or appealable order. The ordinary rule was well stated in *Credits Commutation Co.* v. *United States* 177 U. S. 311, 315 as follows:

> When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court.

The rule stated has been recognized in a multitude of cases including the following:

*United States* v. *California Canneries,* 279 U. S. 553.

*Rodman* v. *Richfield Oil Co. of California,* 66 F. (2d) 244 (C. C. A. 9);

*Baker* v. *Spokane Sav. Bank,* 71 F. (2d) 487 (C. C. A. 9);

*Washington* v. *United States,* 87 F. (2d) 421 (C. C. A. 9).

*1. The exception applied in certain cases where the applicant for leave to intervene has an immediate interest in a fund, has no application here where there may never be a fund. Furthermore appellants do not invoke this exception.*

It is true that there are exceptions to the rule that an order denying leave to intervene is not appealable. The whole rule was stated in *United States* v. *California Canneries,* 279 U. S. 553, 556 (omitting citations) as follows:

> It [the lower court] did not refer to the decisions which hold that an order denying leave to intervene is not appealable, except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit.

Likewise in *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315, 316, the exceptional case is described as follows:

> It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated.

A careful reading of appellants' brief discloses that they base their right to intervene solely upon their interpretation of the Act of June 25, 1929, and not upon an assertion that they should be permitted to protect their interest in a fund. This latter claim was put forward as an alternative prayer in their petition and motion "to review, revise and amend" filed March 11, 1938 (R. 1192, 1204), wherein they asked that the court reserve for them an opportunity to present their contentions "at a later date in this court, after the court has established a fund." The court did this very thing in its order of March 22, 1938 (R. 1209, 1210). Hence it appears that insofar as appellants sought protection in respect to a fund, their request in this regard was granted, and they have no ground for complaint. This portion of their petition and motion "to review," etc., was a clear rec-

ognition that no fund then existed in which they might have an immediate interest.

Founding their asserted right to intervene upon a mistaken interpretation of the Act of June 25, 1929, appellants proceeded to make it clear that they were insisting as a matter of absolute right under the statute, upon an immediate determination of the issue which they seek to present, namely, whether the railway company is or is not the successor of the railroad company and as such, the owner of the rights created by the land grant. Many of their moving papers disclose that they demand that the issues of the suit be revised and reformed in deference to their demand that this issue be determined forthwith. Thus on February 19, 1938, and after they had presented their motion and petition for leave to intervene, they filed a motion "to construe, modify and/or amend the report of Special Master Graves filed July 26, 1937" (R. 1182). This was in effect a motion to require the court to determine the same issue here and now, notwithstanding the fact that no such issue was made by the pleading, as the Master had indicated in his first report (R. 641). On the same day, the appellants filed their so-called "exceptions" to the report of the Master (R. 1185). In this document they adopt all of the exceptions previously taken by counsel for the railroad and the railway company, but add a further exception in effect demanding that the report of the Special Master be disapproved for its failure to render a report upon the issue sought to be raised by the intervening petition. On March 11, 1938, the appellants filed a petition and motion "to review,

revise and amend decree or order entered in this cause March 9, 1938" (R. 1190), in which complaint is made that the Attorney General was derelict and violated the mandate of Congress by failing to put in issue the question whether the railroad or the railway company was entitled to the property involved in the suit. On March 16, 1938, the appellants moved to dismiss the bill of complaint on the same grounds (R. 1207).

The petition in intervention itself makes reference to the appellants' answer and cross-bill (R. 952), and the same is incorporated therein by reference (R. 1043). By this pleading the appellants sought to answer the bill of complaint and to put sundry allegations of the bill in issue exactly as though those issues had not been previously tried and many of them disposed of by the court. No suggestion is made that the answer filed by the railway company to the bill of complaint was insufficient so far as the merits of the controversy between the United States and the defendants were concerned. On the contrary, the assertion is that in each case the answer of the railway company is "fairly accurate" (R. 963 *et seq.)* except insofar as the claim is made in the answer of the railway company that the property and rights involved in the suit belong to it.

It is thus clear that when the petition in intervention came on for hearing before Judge Webster, he had a right to assume that intervention was sought for the purpose of putting the appellants in a position where they might be entitled to an immediate determination of the issue which they sought to present through their petition in intervention. Indeed as late as August 29,

1938, we find the appellants still undertaking to file a motion (R. 1258) seeking to prevent any further proceedings in the suit until appellants' new issue be injected and disposed of in the cause.

It will be recalled that at the time the petition in intervention was called up for hearing before Judge Webster, he was in the midst of hearing argument upon exceptions to the Master's second report. The report had been filed July 26, 1937 and exceptions were taken by counsel for the respective parties within the time fixed by the rules. Judge Webster knew that after he had completed his review of the Master's report and had disposed of the exceptions taken thereto, his order made upon this phase of the case would probably be reviewed by the Supreme Court under the authority of the Special Act of May 22, 1936, 49 Stat. 1369, set out in full in the Appendix, *infra,* which authorizes a direct appeal from this and the prior interlocutory order on a review of the Master's first report. This appeal, as pointed out in the statement of the case, *supra,* p. 14, would precede the determination of the amount of any compensation which might be awarded against the United States.

It is apparent that upon such an appeal the Supreme Court may sustain the Government's contention that all rights of the grantee under the land grant have terminated and become forfeited, or that such rights have become barred by the fraud or other misconduct of the railroad company or of the railway company. The Supreme Court may sustain the Government's position with respect to the Indian Point, and hold that in consequence of the facts pleaded neither the railroad com-

pany nor the railway company is entitled to any further lands. The Supreme Court may hold that certain of the issues tried must be retried and additional findings made. It may hold that the trial court shall proceed with a further accounting for the purpose of ascertaining what if any compensation is due to or from the United States. But certain it is that until the decision of the Supreme Court be handed down, no fund will have been established as to which the exceptions to the ordinary rule relating to intervention might be made to apply. It is the position of the United States that under the provisions of the Act of June 25, 1929, there never will be a time under any conceivable state of facts when the court will be authorized or empowered to try in this suit the issues sought to be presented by the interveners or to permit them to intervene for that purpose. That point aside, however, it is clear that no rule of law or equity required Judge Webster to proceed to try issues which were purely hypothetical and which might become entirely moot on the disposition of the appeal by the Supreme Court. There is no requirement that intervention must be allowed for the purpose of requiring the court to engage in a purely speculative investigation.

It will be noted that the decisions which recognize the exception to the ordinary rule and permit intervention in certain cases in which the intervener makes claim to a fund in the hands of the court, have been careful to point out that that exception applies only when the intervener has an *immediate* interest in the fund, or where the circumstances are such that the fund is likely to be dissipated.

Thus in *United States* v. *California Canneries,* 279 U. S. 553, 556, the language of the court is "except where he who seeks to intervene has a *direct* and *immediate* interest in a *res* which is the subject of the suit." [Italics supplied]. And in *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 316, the exception is said to apply only "where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene *before the fund is dissipated.*" [Italics supplied].

That there was no possibility that any right asserted by the appellants would be lost within the meaning of the rule last stated is made doubly clear by the recital by Judge Webster that his then denial of leave to intervene was without prejudice to the rights of the appellants to assert their claim "when the fund, if any, to be distributed by the United States is established and fixed" (R. 1210).

An order of the trial court denying intervention "without prejudice," was expressly approved by this court in *King* v. *Barr,* 262 Fed. 56, 60, 62; *cert. denied* 253 U. S. 484.

*C. The appellants do not make a sufficient showing of inadequate representation.*

A careful examination of the proposed petition fails to disclose any claim by petitioners that the claim against the United States, for lands or compensation, is not being adequately presented. On the other hand, the numerous papers filed by the appellants show positively that so far as the claim against the United States is concerned, they have no complaint to make. Thus their

"answer and cross-bill," referred to in the petition for intervention, repeatedly speaks of the answer of the railway company as "fairly accurate" (R. 963,964,965, *et seq.)* When appellants attempted to file exceptions they adopted *in toto* those of the railway company (R. 1185).

Rule 24 of the new Federal Rules of Civil Procedure, relating to intervention, though not applicable here because not in effect at the time of the order, is nevertheless declaratory of the rules heretofore stated by the courts. That portion relating to "Intervention of Right" reads as follows:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

It requires no more than a reading of subdivision (2) above to make clear the proposition that this attempted intervention involves so much claim. See *New York City* v. *New York Tel. Co.,* 261 U. S. 312, 316; *O'Connell* v. *Pacific Gas & Electric Co.,* 19 F. (2d) 460 (C. C. A. 9); *Difani* v. *Riverside County Oil Co.,* 201 Cal. 210, 215.

It must be borne in mind that what we are here discussing is the question of adequate representation in respect to the claims against the United States. As the suit now stands there is no other issue before the court than those made necessary by an inquiry as to what

compensation if any may be due from the United States. It is clear that the evidence and the law to establish such claims against the United States has been fully and adequately presented.

No assertion is made that the railroad company or the railway company have not done all that could possibly be done in the establishment of a claim against the United States. So far as the "respective rights of the United States and said companies"[12] are concerned, appellants have no more right to intervene than any other corporate stockholders. Bates, Federal Equity Procedure, sec. 57.

*D. The denial of intervention by the trial court was not a denial of relief.*

Speaking of the rare exceptions to the general rule that the granting or denial of leave to intervene is within the discretion of the trial court, the Supreme Court in *Credits Commutation Co.* v. *United States,* 177 U. S. 311, said (pp. 315-316):

> It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention.

This suggestion that intervention is recognized as an absolute right only when no other appropriate form of proceeding is open to the intervenor, was pointed out by this court in *Washington* v. *United States,* 87 F. (2d) 421, 433-434 (C. C. A. 9), as follows:

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[12]This is the language of Section 5 of the Act of June 25, 1929, which refers to "all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies.

> Ordinarily, the denial of the petition adjudicates nothing but the right to intervene, and has no force as res judicata on the merits. Such a denial 'leaves the petitioner at full liberty to assert his right in any other appropriate form of proceeding.' In other words, the petitioner in an independent preceeding of some kind may litigate the same question which he seeks to litigate by intervention. *If there is any 'other appropriate form of preceeding' open to the intervenor, the order denying intervention is not final, and therefore not appealable, because the order does not 'terminate the litigation between the parties on the merits of the case'.* [Italics supplied].

Is there any conceivable reason why the appellants are not at liberty to bring an independent stockholders' bill in any court of competent jurisdiction to determine the extraneous issues which they seek to inject in this suit? That very thing was done in the Hoover suit to which many references are made in their petition (R. 1044, 1052). Indeed, inasmuch as the appellants' claims, if they be valid at all, extend not only to the railway's interest in the land grant but to its tracks, depots, rolling stock, bank account, and other property of every kind and description, it would appear that an independent suit would afford the appellants much more adequate relief.

The assertion that the United States is a necessary party to a suit between the railroad company and the railway company to determine which is the owner of the land grant is utterly unsupported and manifestly absurd. The rule relating to necessary and indispensable parties in a suit of that kind, takes account of the distinction between an interest in the subject matter and an interest in the object of the suit. As stated in Story, Equity

Pleadings, (9th ed.) sec. 72, "It is not all persons who have an interest in the *subject*-matter of the suit, but, in general, those only who have an interest in the *object* of the suit, who are ordinarily required to be made parties." It is for this reason that a mortgagee is not a necessary party to a suit to set aside a fraudulent conveyance of mortgaged property *Venable* v. *United States Bank,* 2 Pet. 107, or a trustee in a suit solely between *cestuis que trustent.* See *Walden* v. *Skinner,* 101 U. S. 577, 588-589. In holding that a bankrupt is not a necessary party to a bill filed by the assignee in bankruptcy to set aside the bankrupt's conveyance of real and personal property as a fraud upon creditors, the Supreme Court said in *Buffington* v. *Harvey,* 95 U. S. 99, 103:

> As to the bankrupt himself, the conveyance was good; if set aside, it could only benefit his creditors. He could not gain or lose, which ever way it might be decided.

It is obvious that the United States cannot gain or lose no matter what may be the decision as to whether the railway company is or is not the successor of the railroad company. The United States has no interest in that contention.

The cases cited by the appellants in an effort to demonstrate that the United States would be a necessary or indispensable party in such an independent proceeding, have not the remotest application to the point involved. They are so obviously beside the point as not to warrant comment in this brief.

If there were any such rule as that asserted by appellants to the effect that in a dispute by claimants to public lands, the United States is a necessary or indis-

pensable party, then in view of the oft-repeated rule that a court of equity will on its own motion, decline to proceed in the absence of indispensable parties, it is passing strange that in none of the following cases, all of which involve controversies between rival claimants to public lands, most of them under land grants and many of them under the very land grant here involved, was there any suggestion by the court or counsel that the United States was a necessary party:

(1) *Ryan* v. *Railroad Co.*, 99 U. S. 382.
(Homesteader against land grant railroad. Attorney General granted leave to participate in oral argument.)

(2) *Missouri, K. & T. Ry.* v. *Kansas Pac. Ry.*, 97 U. S. 491.
(Title to land claimed by two railroads under grants from the United States.)

(3) *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190.
(Same, Northern Pacific grant in controversy.)

(4) *Railroad Co.* v. *Baldwin*, 103 U. S. 426.
(Title to land within right-of-way between railroad grantee of the United States and an individual.)

(5) *Buttz v. Northern Pacific R. R.*, 119 U. S. 55.
(Railroad claiming under land grant against individual claiming by preemption.)

(6) *St. Paul & Pacific R. R.* v. *Northern Pacific* R. R., 139 U. S. 1.
Title to lands claimed by litigants under separate land grants.)

(7) *Bardon* v. *Northern Pacific R. R.*, 145 U. S. 535.
(Land grant railroad against a preemptioner.)

(8) *Northern Pacific R. R.* v. *Musser-Sauntry Co.,* 168 U. S. 604.
(Railroad grantee against successor of earlier railroad grantee.)

(9) *Sjoli* v. *Dreschel,* 199 U. S. 564.
(Patentee against grantee of Northern Pacific.)

(10) *Weyerhauser* v. *Hoyt,* 219 U. S. 380.
(Grantee of Northern Pacific against purchaser under timber and stone act.)

The case of *Skeen* v. *Lynch,* 48 F. (2d) 1044 (C. C. A. 10), upon which appellants rely, is distinguished and fully explained by this court in *Washington* v. *United States,* 87 F. (2d) 421, 429 (C. C. A. 9).

*II. The denial of the right to intervene was a proper exercise of the discretion of the trial court because to allow appellants to intervene would unduly complicate and vex the issues to be tried by bringing into the suit a controversy solely between interveners and the defendants, a field of litigation not in issue between or open to the original parties.*

Pursuant to the mandate of the Act of June 25, 1929, the bill of complaint was filed against the Northern Pacific Railroad Company "and its successor, the Northern Pacific Railway Company". Accordingly the bill alleges that the railway company is the successor to the railroad company (R. 35). Hence, the Master, in his first Report correctly pointed out that the bill tendered no issue upon this point (R. 641).

It is therefore clear that to allow the intervention would unduly complicate and vex the issues to be tried by the District Court. This is true not merely because, as previously pointed out, the allowance of the intervention would have projected the court in the trial of issues

which might become moot after the decision of the Supreme Court on the appeal authorized by the Act of May 22, 1936, but because the new issues presented by the appellants would bring into the suit a controversy solely between interveners and defendant, which is a field of litigation not in issue between or open to the original parties.

As stated in *Chandler Co.* v. *Brandtjen, Inc.,* 296 U. S. 53, 58:

> Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited to the field of litigation open to the original parties.

So also in *Aiken v. Cornell,* 90 F. (2d) 567, C. C. A. 5), the court said (p. 568):

> * * * there was no abuse of discretion in disallowing the interventions upon the finding the court made that it would unduly complicate and vex the issues to be tried by bringing into the suit other persons having individual interests not at all affected by the claims advanced nor the decree to be entered on it.

As indicated by Rule 24 of the Federal Rules of Civil Procedure, even "permissive" intervention is limited to a case "when an applicant's claim or defense and the main action have a question of law or fact in common." *Bache* v. *Hinde,* 6 F. (2d) 508, 513, (C. C. A. 6).

Indeed, it is obvious from the frame of the petition in intervention that it relates to property and rights wholly foreign to this suit, for the petition lays claim to all assets of the railway company (R. 1026, 1040, 1172), while the original suit relates solely to the land grant. Surely such an intervention cannot be in subordination to the main action as required by Equity Rule 37.

*III. The Application to Intervene Was Not Timely.*

As has been pointed out, pp. 37-40, *supra,* appellants are demanding intervention, not for the protection of an interest in a fund, but for the purpose of injecting their new issues forthwith into this suit. They attempt to interpose an answer to the entire bill (R. 952), they move to dismiss the bill (R. 1207), they file exceptions to the Master's report (R. 1185), and they move to strike the stipulation of the parties (R. 1251) by which certain omissions in the testimony may be supplemented by affidavits and other matters incidental to the court's review of the Master's report are disposed of (R. 1258). It is obvious that the only purpose of an intervention at this stage of the proceedings would be to permit appellants to demand an immediate hearing upon matters such as these, and it is also obvious that an application for such an intervention is not timely.

By their own showing appellants have known of their present claims since 1896 (R. 1043). They have known of the Hoover suit since 1900 (R. 1044). They claim they

> had since 1900 continuously sought a Congressional Investigation * * * and * * * believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the Petitioners * * *.

(Assignment of Error No. XVIII, R. 1226-1227). They have known of this suit since its institution on July 31, 1930, and therefore have known that the bill of complaint tenders no issue as to whether the railway

company is the successor of the railroad company (R. 35).

The delay in moving to intervene is wholly unexcused and inexcusable. Under such circumstances Judge Webster was acting entirely within his discretion in denying the request for leave to intervene.

The applicable rule was stated by this court in *Merriam* v. *Bryan,* 36 F. (2d) 578, 579, (C. C. A. 9) as follows:

> It will thus be seen that more than three years elapsed between the commencement of the principal suit and the filing of the motion for leave to intervene. The rule is well settled that applications of this kind must be in subordination to and in recognition of the propriety of the main proceedings, that they must be timely made, and that they are addressed to the sound discretion of the court. Equity Rule 37; Buel v. Farmers' Loan & Trust Co. (C. C. A.) 104 F. 839, 842. The rule is well stated in the Buel Case, in an opinion participated in by Judges Lurton and Day:
>
> > "It seems to be quite well settled that the granting leave to intervene in a case to which the petitioner is not a party is a matter addressed to the discretion of the court, to be exercised upon consideration of all the circumstances of the case. Among other things, the court will regard the seasonableness of the application, and the extent to which those already parties to the suit may be injuriously affected by admitting the new party to assert his claims and have them litigated at that stage of the case. The question for the court will be whether the petitioner has slept upon his rights and unreasanably delayed his application. Another will be whether it will be more convenient that he litigate his rights upon an independent bill."

The present application does not satisfy any of these requirements. The appellant had full knowlelge of the pendency of the principal suit from the beginning, was a witness at the trial, and has offered no excuse whatever for the delay.

*IV. Proceedings had prior to or subsequent to the attempted intervention from which this appeal is taken are not relevant to this appeal.*

For reasons not made plain appellants have inserted in the appendix to their brief numerous purported assignments of error which they undertake to discuss in their brief. Somewhat similar assignments of error are shown in the printed record as filed March 22, 1938 (R. 1217). These related to a petition for appeal to the Supreme Court and have no connection with the appeal pending here.

An examination of the subject matter of these so-called assignments of error will disclose that most of them relate to orders and rulings which long antedate appellants' attempted intervention. Even if appellants were permitted to intervene, they could not raise any question with reference to those matters by reason of the provision of Equity Rule 37 that "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

For some reason, likewise unknown, appellants have inserted in the printed record matters which transpired long after the entry of the order from which they appeal. Obviously they cannot rely upon what occurred after the order was made for the purpose of putting Judge Webster in error.

It is submitted that under all conceivable circum-

stances the order appealed from was at least within the discretion of the District Court, that the order was therefore not appealable, and that in any event the appeal is without merit. The appeal should be dismissed or the order of the court below affirmed.

Respectfully submitted,

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# APPENDIX

## A

Act of June 25, 1929, 46 Stat. 41:

Chap. 41.—An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of the said land grants, and are hereby retained by the United States as part and

parcel of the Government reservations wherein they are situate, relieved and freed from all claims, if any exist, which the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants: *Provided,* That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

Sec. 2. That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States.

Sec. 3. The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby; and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is

hereby reserved to the United States to, at any time, enact further legislation relating thereto.

Sec. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.

Sec. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virture of authority conferred in the said resolution of

May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

Sec. 6. All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts. In fixing the amount, if any, the said companies are entitled to receive on account of the retention by the

United States of indemnity lands within national forests and other Government reservations, as by this enactment provided, the court shall determine the full value of the interest which may be rightfully claimed by said companies, or either of them, in said lands under the terms of said grants, and shall determine what quantities in land or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies, or either of them, or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court. To carry out this enactment the court may render such judgments and decrees as law and equity may require

Sec. 7. The suit, or suits, herein authorized shall be brought in a district court of the United States for some district within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, and may be consolidated with any other actions now pending between the same parties in the same court involding the subject matter, and any such court shall in any such suit have jurisdiction to hear and determine all matters and things submitted to it in pursuance of the provisions of this Act, and in any such suit brought by the Attorney General hereunder any persons having an interest in or lien upon any lands included in the lands claimed by the United States, or by said companies, or any interest in the proceeds or avails thereof may be made parties. On filing the complaint in such cause, writs of subpoena may be issued by the court against any parties defendant, which writs shall run into any districts and shall be served, as any other like process, by the respective marshals of such districts. The judgment, or judg-

ments, which may be rendered in said district court shall be subject to review on appeal by the United States circuit court of appeals for the circuit which includes the district in which the suit is brought, and the judgment, or judgments, of such United States circuit court of appeals shall be reviewable by the Supreme Court of the United States, as in other cases. Any case begun in accordance with this Act shall be expedited in every way, and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for.

Sec. 8. It shall be the duty of the Attorney General to report to the Congress of the United States any final determinations rendered in such suit or proceedings, and the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture shall thereafter submit to Congress recommendations for the enactment of such legislation, if any, as may be deemed by them to be desirable in the interests of the United States in connection with the execution of said decree or otherwise.

Sec. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined: *Provided,* That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to

the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto.

Approved, June 25, 1929.

B

Act of May 22, 1936, 49 Stat. 1369:

[Chapter 444.] An Act to supplement the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), which authorized and directed the Attorney General to institute suit against the Northern Pacific Railway Company and others.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect.

Approved, May 22, 1936.